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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 861

LEONARD BURTMAN and BENEDICT HIMMEL,

*Petitioners,*

—against—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your Petitioners, Leonard Burtman and Benedict Himmel, hereby petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming their conviction for conspiracy to bribe a Customs officer, despite the denial of their motions for severance and the resultant admission into

evidence against them of post-conspiracy declarations of their co-defendants made at meetings at which both Petitioners were not present.

## Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, is appended as Appendix A. A Petition for Rehearing below was denied without opinion.

The trial court rendered no opinion except upon Petitioners' motion for a new trial based upon newly discovered evidence, appended as Appendix B.

## Jurisdiction

The order sought to be reviewed was made and entered on July 29, 1970, and is appended hereto as Appendix C. An order denying a timely Petition for Rehearing was made on August 18, 1970, entered on August 24, 1970, and amended on August 31, 1970; it is appended as Appendix D, in its amended form.

On September 18, 1970, Mr. Justice Harlan of this Court granted an order extending the time for filing a Petition for Writ of Certiorari to and including October 16, 1970. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U. S. C. §1254(1).

The original order denying the Petition for Rehearing below was amended on August 31, 1970 to include denial of Petitioners' application for stay of mandate. Upon application for stay of execution of judgment pursuant to mandate, Mr. Justice Harlan of this Court, in an Order dated September 25, 1970, stayed the execution and enforcement of the judgment, pending the timely fil-

ing of a Petition for a Writ of Certiorari. A copy of his Memorandum attached to the Order is annexed as Appendix E.

## Questions Presented for Review

1. Should Petitioners' motion for a severance have been granted, in a prosecution for conspiracy to defraud the United States by bribing a Customs officer to let two shipments of booklets through Customs, when it appeared at the threshold of trial, and later materialized, that post-conspiracy declarations of Petitioners' co-defendants inculpating Petitioners (made at meetings after the last shipment had been confiscated by the authorities) would be received in evidence?

2. In such prosecution, was it error to affirm the denial of Petitioners' motion for judgment of acquittal when the only proof of bribery was the uncorroborated testimony of an informant that (I) at the first such meeting attended by Petitioners, they (primarily Petitioner Burtman) stated that a shipment of "beaver" [pictures showing pubic hair] had broken open on the dock and been seized by Customs, that it had been addressed to someone paid to "take the rap", (II) at the second such meeting, attended by Petitioners, Petitioner Burtman stated that a Customs officer had been paid to let the shipment through and would stand up in the investigative process, (III) at the third meeting, not attended by Petitioner Himmel, another co-defendant, Tourine, added that Customs Agent Cassotta had been paid $1000 and $3000 prior to the intereception of the second shipment, and that everyone was to sit tight, and (IV) at the fourth meeting, not attended by either Petitioner, another co-defendant, Giordano, sought and received reassurance from Tourine that the Customs Officer would stand up, Tourine stating the Customs Officer was taken care of and had no choice.

## Constitutional Provisions and Statutes Involved

Amendment V, U. S. Constitution:

> "No person shall be * * * deprived of * * * liberty, or property, without due process of law * * *."

Amendment VI, U. S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *."

18 U. S. C. §371, 62 Stat. 701:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

## STATEMENT OF THE CASE

### The Indictment

Petitioners were charged, in a one count indictment, together with defendants Tourine and Giordano, "with conspiracy to defraud the United States by bribing a Customs official so that the nature of imported merchandise would be concealed, in violation of 18 U. S. C. 371." (Memorandum for the United States in Opposition to the Stay of Mandate, p. 1.)

The indictment further charged that co-defendant Tourine would bribe the then Customs employee, Michael

Cassotta, to permit the entry of merchandise which defendants would import and that defendants would seek to avoid a Customs determination of obscenity by means of such payments and would conceal that such merchandise was being brought into the country "by means of influencing said Cassotta in his duties" (4a)*.

As overt acts, it was charged that Petitioners had caused two shipments of magazines to be imported, in December 1967 and April 1968 (5a).

## The Trial

### Motion for Severance

At the threshold of trial, in support of Petitioners' motion for a severance, Petitioners advised the court that the records just furnished to Petitioners' counsel showed that the second shipment of booklets, labelled as earthenware, had broken open on May 1, 1968 and their true contents discovered. Petitioners argued, however, that the conversations which would be testified to, according to the bill of particulars (6a-8a), all took place after May 1, 1968, when the conspiracy had ended because of the immediate confiscation of the second shipment. Petitioners' counsel noted "* * * that what we are inevitably going to run into here is a Bruton situation" (26a), that the statements to be testified to "* * * would be statements made after that crate had opened, when the conspiracy must have come to an end and, therefore, we will definitely be in a Bruton type situation if the severance motion is not granted." (27a-28a).

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* Such references are to the pages of the Appendix previously filed with the Clerk of this Court.

The Government, however, contended that the conspiracy did not end when the shipment broke open because, it claimed, "* * * the proof [would] show that the conspiracy involved bribery of a Customs official to keep the entire matter of where the shipments originated confidential from the Customs authorities, and that that, indeed, was the subject covered in these conversations pursuant to the conspiracy" (28a). (See n. 6, *infra*.)

The motion for severance was again denied. *Ibid.*

After the case was marked ready for trial, Petitioners' counsel noted, referring to his severance motion (35a-36a), that the Section 3500 material just handed to him made it quite clear that the conversations to be testified to all occurred after the conspiracy terminated, and renewed his motion for a severance. After further colloquy, the Court ruled that the conspiracy did not terminate after it had been discovered, "* * * if there are attempts to conceal it or in any way make it difficult for the Government or anybody else to investigate it * * *." (35a-38a).

## Testimony of Agent Murray

The Government then introduced testimony of Agent Murray as to what was said at four meetings, all held after the second shipment had broken up and its contents been confiscated. Murray said that both Petitioners were present at the first two meetings, Petitioner Himmel was not present at the third meeting, and neither of the Petitioners were present at the fourth meeting.

Murray testified that at the first meeting Petitioners (primarily Burtman) stated that a shipment of "beaver" [books showing pubic hair] had broken open on the docks; had been seized; that the shipment was addressed

to one Grasberg, or in his name; and that he had been paid for taking the "rap" (74a-78a).

Murray testified that at the second meeting, with both Petitioners, it was mentioned that a Customs officer had been paid to pass the shipment through. He said that Petitioner Burtman mentioned that a Customs officer had been paid and would "stand up" in an investigation (78a-81a).

Murray related that at the third meeting, held with Petitioner Burtman and others (including co-defendants Tourine and Giordano) (83a), but with Petitioner Himmel absent (134a), Burtman stated that the shipment had been found on the dock, that it had broken open, that there was beaver all over the dock (90a); that it had been seized by Customs; that Burtman asked reassurance from co-defendant Tourine that everything was in order, that the Customs officer would stand up, which reassurance was given; Tourine stated that the Agent Cassotta had been paid and taken care of, in the amounts of $1,000 and $3,000, and that everyone was to sit tight (92a-93a). Murray testified that these payments had been made prior to the intereception of the second shipment, to let it go through.[1]

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[1] "A. Mr. Burtman is the one who stated that someone was paid for it and was the one who let the shipment go through, that is, in substance.

Q. What shipment was he talking about?

A. He was talking about a shipment that had been broken up on the dock by accident and found to contain a load of pornographic books that the Custom Service seized.

*(Continued on following page)*

Murray recited that at the fourth meeting held with co-defendants Tourine and Giordano, at which neither Petitioner was present, Giordano sought reassurance that the Customs officer would stand up, and said that Tourine stated that the Customs officer was taken care of, he had no choice. There was no conversation as to what should be done beyond sitting tight (95a).

## Renewal of Severance Motion

Thereafter, Petitioners renewed their severance motion, noting that there was no evidence that any of the post-conspiracy conversations were made in an attempt to conceal the conspiracy, or in furtherance thereof; that none of the statements made by other than Petitioners were properly admissible against Petitioners and that there should have been a severance in the first place (286a-287a). The Court again denied the motion, ruling

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*(Continued from preceding page)*

Q. Your testimony is that in talking about a shipment which had been seized Mr. Burtman said that a Customs agent would let it go through?

A. That is correct.

Q. Even though it had been seized already?

A. Oh, no, no, he was speaking of the Customs officer who had already been taken care of prior to the discovery by accident of this load." (124a).

• • •

"A. Yes, Mr. Tourine assured that the Customs officer—he mentioned the name Cassotta—had been taken care of, he had been paid a thousand and three thousand dollars, that he had stood up, that he had had a heart attack, he was in the hospital, and he just couldn't go any other way." (136a).

that the jury could find continuation of the conspiracy until indictment.[2]

## Motion for Judgment of Acquittal

The Trial Court having thus ruled that it might be found as a matter of fact that the conspiracy continued after the discovery of the second shipment, counsel moved for a judgment of acquittal, relying heavily upon *Grunewald* v. *United States*, 353 U. S. 391 (1957), and *Krulewitch* v. *United States*, 336 U. S. 440, 442-3 (1949). Extensive argument was had (492a-514a), and a separate memorandum of law in support of the motion sub-

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[2] "The Court: I leave that for the jury's judgment.

"I think that is a fact for [the jury] to determine in the circumstances of this case, particularly with innuendoes which have been cast here, namely, that this is a continuing thing, as far as Cassotta is concerned, up until the filing of the indictment, as far as I can figure out from this testimony, and the fact that he had this heart condition and was in the hospital, and they were going to sit tight and watch and wait, and so forth, that indicates to me a continuing course of conduct that the jury could possibly find.

"I don't say they have to find it, but they might find it.

"Mr. Levy [Attorney for Petitioners]: I would think it would indicate quite clearly as a matter of law the course of non-conduct, of doing absolutely nothing.

"The Court: That is what you would find as a juror. On the other hand, I might reasonably find as a juror that they would keep rein on Cassotta and keep after him and make sure that nothing happened here, and continue on up until the filing of the indictment. That is a fact question. That has to do with the law in the case.

"Unless you have anything to add to that, I would continue to deny your motion, with an exception to the defendants, namely, Burtman and Himmell." (287a-288a).

mitted, copy of which accompanied the stay application in this Court. The motion was finally denied (719a-721a).

## Charge, Exceptions and Results

The trial court permitted the jury to infer that the second payment of $3,000 was made after the second shipment had been discovered. The court charged (615a):

> "If he [Cassotta] was getting a thousand dollars just to let it go by, why is he getting $3,000 the second time around? Well now, of course, the material has hit the street, the authorities are aware of it, he is a sick man, he is in the hospital, he will sit put, he will stay put, 'We won't have to worry about him, we will just sit tight.' You may very well infer from that that there were additional moneys paid because of the fact that the second one was discovered."[3]

The court, in its charge to the jury, gave no guidelines on how to determine when the conspiracy terminated, and an exception to the jury charge was accordingly taken, the court ruling that the conspiracy contin-

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[3] This portion of the charge was excepted to, counsel for Tourine noting (636a): "Your Honor, you commented on the payment of a thousand dollars and three thousand dollars. You suggested to the jury that the three thousand dollars might have been paid to keep Cassotta quiet after the shipment was found. This comment is based on, as far as I know, no evidence in the case whatsoever. It is not in the record whatsoever." Exception was noted. *Ibid.* It had been stipulated and agreed that all objections, requests and exceptions made by any defendant would apply to all (655a).

ued beyond the discovery of the second shipment, as a matter of law.[4]

Petitioners Burtman and Himmel were found guilty. The jury disagreed as to defendants Tourine and Giordano (682a, 714a).

The motion for a new trial based upon newly discovered evidence made by Petitioners was denied (App. B).

Petitioners were each sentenced to a year in jail and a $5,000 committed fine, which fines were bonded, and they continued free on bail pending the appeal to the United States Court of Appeals for the Second Circuit.

## Proceedings in the United States Court of Appeals for the Second Circuit

In the United States Court of Appeals, Petitioners briefed and argued the issue, "7. Should appellants' motion for a severance have been granted?", *Bruton* v. *United States*, 391 U. S. 123 (1968) being cited at oral argument. An additional question briefed and argued was: "Was it error to deny appellants' motion for judgment of acquittal • • •, when (a) the only proof of bribery was testimony of an informant who related that varying defendants had made statements that a shipment had been discovered on the dock, a Customs agent had been paid, and everyone should sit tight; (b) such alleged statements were made after the shipment had been discovered and confiscated by the authorities?"

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[4] "Mr. Wadden [Counsel for Defendant Tourine]: "Your Honor, you did not give the jury any guidelines as to how they determine when a conspiracy terminates and that they could not consider any evidence of mere concealment after the termination of a conspiracy."

"The Court: I find that is a judgment for the Court to make. • • • I note the exception." (636a).

*Grunewald* and *Krulewitch* were emphasized in the brief, the trial court having ruled that, as a matter of law, the conspiracy continued until the day of the indictment, though, Petitioners argued, the testimony had been consistently clear that both payments to Cassotta had been made prior to the discovery and confiscation of the second shipment.

The Court of Appeals affirmed, ruling that it need not decide how long the conspiracy continued, "because the inculpatory statements of the defendants, testified to by Murray were not told him by an alleged co-conspirator of the accused but by the defendants themselves." (5a).

A Petition for Rehearing was filed, alleging the incorrectness of this statement, but was denied without opinion by the Court of Appeals, which also denied the application to stay the mandate.

## Prior Proceedings in this Court

Application was made to Mr. Justice Harlan of this Court for an extension of time to file a Petition for Certiorari and for a stay of execution of the mandate. In separate orders, Mr. Justice Harlan extended the time to file a Petition for Certiorari to October 16, 1970 and granted the application for a stay of execution of the mandate (App. E). This Petition follows.

## Reasons for Granting the Writ

### POINT I

**In permitting the post-conspiracy extra-judicial declarations of co-conspirators to be admitted in evidence against other co-conspirators, the Court below decided a federal question in a way in conflict with applicable decisions of this Court.**

This case is ultimately governed by *Bruton* v. *United States, supra.* There, as here, a severance should have been granted because it appeared that the proof would include testimony of alleged post-conspiracy admissions made by a co-conspirator implicating defendant(s). Here, the conspiracy terminated with the discovery of the second shipment on the docks, since a conspiracy is terminated either by its success or failure. *Krulewitch* v. *United States, supra,* 336 U. S. at 442-3. The purpose of the conspiracy alleged by the indictment was the illegal entry into the country of booklets (mislabelled as earthenware) (4a). That objective was frustrated when the shipment broke open and its contents were confiscated. Accordingly, any statements made thereafter could not have been admitted into evidence against any alleged co-conspirator who had not made that statement, under the constitutional confrontation rule of *Bruton.* Therefore, the moment the Bill of Particulars revealed post-conspiracy conversations at which Petitioners were not present (6a-8a), the motion for a severance should have been granted. Certainly, it should have been granted after the testimony of Agent Murray was given. Accordingly, the renewed motion for a severance should have been granted.

The effect of the denial of the severance motion was to admit into evidence the post-conspiracy declarations of

Giordano and Tourine against Petitioners, and the post-conspiracy declarations of Petitioner Burtman against Petitioner Himmel (made at the third meeting, not attended by Petitioner Himmel).[5]

Though the trial court ruled that as a matter of law the conspiracy continued past the discovery of the second shipment, apparently under the misimpression that the jury could infer that there were additional monies paid to Cassotta because of the discovery of the second shipment, the testimony was consistently clear that the payments were made prior to the discovery of the second shipment of the docks. See n. 1, *supra*. It is patent that the conspiracy terminated upon the discovery. Moreover, it is clear that there were no acts of concealment after discovery of the shipment. All that Murray's

[5] In its Sept. 24, 1970 letter to the Clerk of this Court in opposition to Petitioners' motion for stay of execution of the mandate, the Government noted that "* * * *Bruton* was mentioned below only in the context of the defendants' motion for severance, and not by way of objection to Murray's testimony." However, objection to Murray's testimony would have been superfluous in the light of the trial court's prior rulings that the conspiracy might have continued till the indictment. Moreover, since the post-conspiracy statements were probably admissible against those who uttered them, the only remedy that counsel could have logically sought was an instruction such as that which had been given in *Delli Paoli* v. *United States*, 352 U.S. 232, that each post-conspiracy admission could only be considered against the person making it—but *Bruton*, overruling *Delli Paoli*, held that even such a charge deprives the non-speaking defendant of his Sixth Amendment cross-examination rights. Hence, counsel's only open alternative was to renew his motion for a severance. Indeed, any objection to the evidence, in the light of the prior rulings of the trial court, might have bordered on being contemptuous, and would certainly have been fruitless.

testimony amounted to in this aspect was that everyone was merely to sit tight—that is, do nothing.[6]

If the trial court's finding of the continuation of the conspiracy past the discovery of the shipment rested upon the notion that payment was made to Cassotta after discovery of the shipment, it was completely contrary to the evidence. If it rested upon the Government's theory of a subsidiary conspiracy to conceal, as alleged in the fifth paragraph of the indictment (4a), we note that the theory of a subsidiary conspiracy to conceal was long ago interred in *Grunewald, supra.*

In *Grunewald,* this Court held that even an agreement to conceal fraud by whatever means might be necessary would not render post-conspiracy declarations admissible. Thus, in *Grunewald,* the conspirators insisted on secrecy from the beginning, maintained it, and made "great efforts * * * to conceal the conspiracy when the danger of exposure appeared" (353 U. S. at 403). This Court held:

> "We cannot accede to the proposition that the duration of a conspiracy can be indefinitely lengthened merely because the conspiracy is kept a secret, and merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished." *Id.* at 405.

The Court of Appeals, apparently rejecting both the theories of post-conspiracy payment and the subsidiary

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[6] Though the Government had represented to the Court that the subject of Murray's testimony would be bribery "to keep the entire matter of where the shipments originated confidential from the Customs authorities" (*supra,* p. 6), there was not a scintilla of evidence dealing with this. So far as appears, they originated at the sources listed in the Customs documents.

attempt to conceal, instead attempted to distinguish away *Krulewitch and Grunewald* on the theory that the supposedly inculpatory statements of Petitioners were not told to Murray by an alleged co-conspirator of Petitioners, but by Petitioners themselves. However, the result of the denial of the severance motion, and the affirmance thereof, was to admit into evidence against Petitioner Himmel declarations which occurred at the third meeting at which he was not present, and to permit admission of evidence against both Petitioners as to declarations made by Tourine and Giordano at the fourth meeting—at which neither Petitioner was present.

Thus, the effect of the Court's opinion below is that a post-conspiracy declaration by an alleged co-conspirator may be used against other defendants, even when made outside the presence of those other defendants. We submit that this decision is in a way in conflict with *Bruton, Krulewitch* and *Grunewald.*

It is plain that the admission into evidence of the third and fourth conversations was highly prejudicial to Petitioners. Had the declarations of Burtman at the third meeting not been admitted against either Himmel and/or Burtman, and had the declarations of Giordano and Tourine at the fourth meeting not been admitted against either Petitioner, the Government's case might well have failed. Thus, the name of the Customs agent, Cassotta, first appears in the third conversation; had this not been admissible against either or both of Petitioners, there would have been no significance attached to the shipment going to Cassotta's office; the corroboration found by the Court of Appeals, in Cassotta's passing upon the first shipment and that he would have then normally passed upon the second shipment, would have

been lacking.[7] Indeed, there was no other corroboration of bribery or influence,[8] nor, indeed, was there any proof of an overt act.[9]

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[7] Though the Court below stated "that the customs agent Cassotta checked through the first shipment and, barring the accident of the broken crate, would in the ordinary course have passed upon the second shipment" (6a), there was no proof to this effect whatsoever. There was no proof that Cassotta had checked through the first shipment. He did not testify. Customs Officer Dunn testified that he could not tell from the documents whether Cassotta had examined the shipment, though the sheet concerning such examination would have gone to Cassotta's office (279a-281a), and if it went to Cassotta's office, Cassotta had two men underneath him who would make inspections (284a).

[8] The testimony connecting Petitioners with the first shipment was not corroborative of bribery or influence, since neither Murray's testimony nor any other showed any bribery or influence in regard to the first shipment. The so-called acts of corroboration recited by the Court of Appeals (5a-6a) do not corroborate in any way the statements testified to by Murray; they do not show that Cassotta had been bribed in reference to either shipment. Nor were the contacts of Burtman and Himmel with the first shipment corroborative at all of bribery in regard to the second shipment, the only shipment to which the Murray testimony related. The statement of the Court below that the consignee, Pacific Coast Distributors, was a company owned by Petitioner Burtman (2a) is utterly without any support in the record. Therefore, the verdict of the jury should have been set aside. *Wong Sun* v. *United States*, 371 U.S. 471, 489 (1963); *Opper* v. *United States*, 348 U.S. 84, 91 (1954); *Smith* v. *United States*, 348 U.S. 147, 154 (1954).

[9] Though the trial court had incorrectly advised the jury that there was no contravention of two overt alleged acts (that Petitioners caused importation of both shipments) and that the acts were the documents in evidence showing importation of the shipments (618a-619a), in plain point of fact, neither the shipping documents (790a-808a) nor any of the testimony showed that Petitioners or either of them caused importation of either shipment. Nor was there any evidence whatsoever of the third alleged overt act, to wit: a meeting of all defendants in June, 1968 (5a). In the complete absence of any evidence of the overt acts alleged, the conviction should have been set aside.

This incorrect charge trespassed upon the constitutional prerogatives of the jury, and upon petitioner's privileges against self-incrimination. Exception was duly taken (650a).

If the decision below stand, the law of conspiracy will have been considerably widened beyond the narrow confines allowed in *Grunewald, Krulewitch* and *Bruton*. We submit that in the light of the important implications to the law of conspiracy, due process and confrontation involved in this case, certiorari should be granted. For in any event, the constitutional rule of *Bruton* has been circumvented in the Court below.

## CONCLUSION

**This Court should grant certiorari, and the judgment below should be reversed.**

Respectfully submitted,

HERBERT MONTE LEVY,
HERALD PRICE FAHRINGER,
*Attorneys for Petitioners.*

# APPENDIX A

**Opinion of U. S. Court of Appeals**

## UNITED STATES COURT OF APPEALS

**FOR THE SECOND CIRCUIT**

---

**No. 867—September Term, 1969.**

**(Argued June 19, 1970 Decided July 29, 1970.)**

**Docket No. 34708**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

CHARLES TOURINE, *et ano.*,

*Defendants,*

—and—

LEONARD BURTMAN and BENEDICT HIMMEL,

*Defendants-Appellants.*

---

**Before:**

ANDERSON and FEINBERG, *Circuit Judges*, and
MACMAHON, *District Judge.**

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Appeals from judgments of conviction entered in the United States District Court, Southern District of New York, John M. Cannella, *Judge*, sitting with a jury, after appellants were found guilty of conspiring to violate customs laws in violation of 18 U.S.C. §371, and from denials of motions for new trials based on newly discovered evidence. Affirmed.

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* Of the Southern District of New York, sitting by designation.

HERBERT M. LEVY, Esq., New York, N. Y. (Schwartz, Schindler & Levy, New York, N. Y., on the brief), *for Appellants.*

RICHARD A. GIVENS, Assistant U. S. Attorney, Southern District of New York (Whitney North Seymour, Jr., U. S. Attorney, and James W. Brannigan, Jr., Assistant U. S. Attorney, Southern District of New York, on the brief), *for Appellee.*

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ANDERSON, *Circuit Judge*:

Two shipments of goods, which were imported into the United States from Denmark by Pacific Coast Distributors, a company owned by defendant Leonard Burtman, were invoiced as "earthenware cups and saucers" but were actually pornographic booklets. The first shipment, containing 15 cases, arrived in New York on December 18, 1967, and, pursuant to prior arrangements made by Burtman, was delivered and stored under the supervision of the defendant Himmel in a building occupied by the printing business of Morris Drucker. The storage there was terminated after three or four days, however, when the true contents of the crates was discovered by Drucker's business partner, one Kehyaian, who ordered that the material immediately be removed. The defendant Himmel oversaw the removal of the 15 cases from Drucker's building.

The second shipment, containing 22 cases, arrived in New York on April 30, 1968. Although destined for the S. & G. Speedy Transport Co., it never left the docks, because it was seized by customs agents when one of the crates was accidently dropped and broken open.

The incident on the docks, which resulted in the seizure, gave rise to a series of meetings among the various defendants. On May 7 Burtman and Himmel met at their midtown office, in the company of Alan Murray, an undercover agent for the Government, to discuss potential repercussions of the discovery by the customs authorities of the contents of the crates. From Burtman's and Himmel's own statements, made to each other in the presence and hearing of agent Murray and testified to by him at the trial, it appeared that the appellants believed that the only person whose participation in the scheme would be discovered was one Grasberg, an employee and agent of Pacific Coast Distributors, who had made the arrangements for the actual importation of the two shipments. Burtman assured Himmel that Grasberg could be trusted, and the two agreed that he should be "taken care of" for accepting full responsibility. Burtman and Himmel met again on the following day, once more in Murray's presence and hearing. At this meeting they discussed the extent to which they could trust Michael Cassotta, a customs agent who had been bribed to pass the shipment through customs without questioning its contents and who had already done so with the first shipment. Burtman assured Himmel that Cassotta could be "trusted," and that he would not talk in the face of an investigation. Cassotta's reliability was also considered at yet a third meeting on May 17th, similarly attended by Murray, between Burtman and co-defendants Charles Tourine and Pasquale Giordano at a midtown Manhattan restaurant. Tourine assured Burtman that Cassotta had been given two payments, one of $1,000 and another of $3,000, and that Burtman could rest assured that Cassotta would not talk.

A one-count indictment was subsequently filed in the Southern District of New York against Burtman, Himmel, Tourine and Giordano, charging them under 18 U.S.C. §371 with conspiracy to defraud the United States and the Bureau of Customs by bribing customs agents and employees and otherwise avoiding customs inspections of items imported into the United States. The jury found Burtman and Himmel guilty as charged, but it was unable to reach a verdict as to Tourine and Giordano. A subsequent motion by appellants' counsel for a new trial on the ground of newly discovered evidence was denied, and each of the convicted defendants was sentenced to one year imprisonment and a $5,000 fine.

The appellants' principal claim on appeal is that the court committed reversible error when it allowed undercover agent Murray to testify at the trial concerning the admissions made by them which he had heard. They cite as authority for their position *Krulewitch* v. *United States*, 336 U.S. 440, 442-3 (1949), and *Grunewald* v. *United States*, 353 U.S. 391 (1957). Both of these cases concerned claims by the prosecution that the conspiracy had continued beyond the commission of the substantive offenses involved through a period during which the accused were trying to conceal the offenses and their participation in them. In the first of the two cases the purpose of the Government in trying to extend the period of the conspiracy was to get into evidence the complaining witness' hearsay testimony of what a claimed co-conspirator said the defendant said. In the second of the two cases, the Government sought to get by a three-year statute of limitations by showing that the original conspiracy included, beside the arrangement for the substantive offense, an agreement and plan among the accused for concealment of the offense and

their participation in it, and that the conspiracy continued through the carrying out of this plan of concealment. The Supreme Court held that there was no direct evidence of such an "express original agreement among the conspirators . . ."

The Government asserts there was such an agreement in the present case and points to some evidence in support of it. Whether there was sufficient to warrant a finding that the alleged conspiracy continued into the concealment and avoidance period need not be passed upon, however, because the inculpatory statements of the defendants, testified to by Murray were not told him by an alleged co-conspirator of the accused but by the defendants themselves. There was no need to show that the conspiracy extended beyond the point where the crate broke open and the true contents were disclosed and seized. The defendants' statements qualified as admissions and were admissible as such as an exception to the hearsay rule. McCormick, *Evidence* ¶239, pp. 502-5 (1954).

The appellants object that even if this is so, the admissions were not sufficient, absent corroboration, to sustain a conviction under the holdings of *Opper* v. *United States*, 348 U.S. 84 (1954), and *Smith* v. *United States*, 348 U.S. 147 (1954). They further assert that there was no such corroboration. The Government, however, points to the independent evidence of the invoices showing the goods shipped as "cups and saucers"; the actual arrival of the shipments of pornographic booklets instead of cups and saucers; the evidence that Burtman was in the magazine business; his arrangements with Drucker for storage of the materials; Himmel's presence at Drucker's printing establishment when the cartons of booklets were unerated; and Himmel's removal of the merchandise. There was evidence connecting the appellants with Pacific Coast Dis-

tributors, consignee of one of the shipments, and with Mr. Grasberg, the employee of Pacific Coast Distributors. There was also the independent evidence that the customs agent Cassotta checked through the first shipment and, barring the accident of the broken crate, would in the ordinary course have passed upon the second shipment.

It is our opinion that there was ample substantial independent evidence to establish the trustworthiness of the admissions. The *Opper* and *Smith* decisions do not require more. *Opper* expressly stated that the corroborative evidence "need not be sufficient, independent of the statements, to establish the corpus delicti." It was, however, sufficient in this case to fortify the truth of the admissions and warranted the jury's drawing the inference that they were true. Moreover, the corroborative evidence together with the admissions were sufficient for the jury to find guilt beyond a reasonable doubt.

Appellants also complain that the court refused to consider their requests to charge. These were not submitted until after the arguments had been completed and the court was just about to deliver its instructions to the jury. Counsels' delay was plainly in violation of Rule 30 F. R. Crim. P. The court on the Friday on which the trial commenced had particularly requested counsel to submit any requests before adjournment on the following Monday afternoon. Counsel for Tourine said he would be unable to submit the requests until sometime later. Apparently the trial court treated Tourine's counsel's representations as made on behalf of all defendants. On Tuesday morning the court said it would receive the requests, and again Tourine's counsel said they had not been prepared but he would have them ready by Wednesday morning. The court said it would "look at them even though they are late." Although it is clear that the

trial judge was desirous of having the requests to charge in hand much earlier than at the close of the evidence, the time specified in Rule 30, he acceded to counsels' several requests to lengthen the earlier time. But the court constantly reminded counsel of the time requirements of the Rule, and never stated that the requests could be filed and ruled upon after the time fixed by the Rule.

Although the attorney for Tourine on Tuesday morning indicated that the case was progressing faster than he had anticipated, neither he nor anyone else suggested that the presentation of the defense evidence and the arguments of counsel were likely to be completed that afternoon. Yet they were, and at that point no further references to requests were made by any counsel. And then, when the trial court had not received the requests before the opening of court Wednesday morning and learned that the defense counsel had not even at that time agreed on what requests to submit, he quite properly went forward with his charge and told counsel, in effect, that any question they might have raised in their requests could be raised through the taking of exceptions. Under the circumstances it became impossible for the court to "inform counsel of its proposed action upon the requests prior to their arguments to the jury . . ." as the Rule directs. If counsel want to invoke this portion of the Rule and insist upon rulings on their requests, they must file them at the close of the evidence. If they have let the time allowed them by the rules go by, they will have to make the best of what the court permits them to do. Of course, a judge should not agree to a particular procedure and then suddenly revoke it to the prejudice of parties relying on it. But whatever construction may be put on the Tuesday morning discussion about filing requests, the judge was

entitled to rely on their being filed a reasonable time before the opening of court on Wednesday morning, particularly in view of the posture of the trial. Instead, at the opening of court, when he was about to deliver his charge, he was faced with the proposal of a further delay to afford counsel an opportunity to examine and discuss the individual requests of each of them.

It is the duty of counsel to comply with the rules, and it does not lie well in their mouths to complain of the court's refusal to accept their requests to charge when they themselves had completely disregarded the precepts of Rule 30.

If requests to charge are to be of any value at all to the trial judge, they must be filed sufficiently in advance of the giving of the charge so that they may be considered by the judge when he prepares the charge. See 8 J. Moore, *Federal Practice* ¶30.03[1] (2d ed. 1969). The requirement that the requests be filed prior to the close of the evidence is also desirable for the purpose of enabling opposing counsel to frame his summation as well as make objections to the proposals. See *id.* at ¶30.03[2]. In the present case both of these objectives were frustrated by appellants' delay. We find it difficult to understand, how trial lawyers, as experienced as those in this case, can seriously contend that they expected the trial judge to give rulings on detailed requests to charge which were submitted to him only minutes before he was required to charge the jury.

The appellants claim they were not only prejudiced by the refusal of the trial court to accept and rule on the requests, but also allege errors in the charge as given, which they assert are set forth in the plethora of exceptions which consumed twenty-one pages of the trial transcript. We hold that the appellants suffered no such preju-

dice; and, after an examination of each of the many exceptions, conclude that none points to reversible error.

Another point raised by the appellants is that the overall effect of the manner in which the trial judge summed-up the evidence was so favorable to the Government that the defendants were, in effect, denied a jury trial.

The trial judge in a federal court may summarize and comment upon the evidence and inferences to be drawn therefrom, in his discretion. This does not mean that he must include every scrap of evidence as if the jury were dependent upon the court's summation alone as the basis for its deliberations. *United States* v. *Kahaner*, 317 F.2d 459, 479 (2 Cir.), *cert. denied* 375 U.S. 836 (1963). The purpose of such summation and comment is to assist the jury in winnowing out the truth from the mass of evidence, much of it conflicting, and perhaps placed out of focus by different claims concerning its meaning and interpretation by the arguments of the parties. So long as the trial judge does not by one means or another try to impose his own opinions and conclusions as to the facts on the jury and does not act as an advocate in advancing factual findings of his own, he may in his discretion decide what evidence he will comment upon. His fairness in doing so must be judged in the context of the whole trial record, particularly the evidence and the arguments of the parties. So examined and considered in the present case, we are satisfied that the court did not step outside of its legitimate province in commenting on the evidence. Although most of what he had to say concerned the Government's, rather than the defendants' evidence, there was a great deal more of the former, which ran over three hundred pages, than the latter, which covered less than one hundred pages of the trial transcript. See *United States* v. *Light*, 394 F.2d 908, 910-11 (2 Cir. 1968).

Although a charge which usurps the function of the jury will not be saved from error by simply repeating in it from time to time that the jury and not the court is the finder of the facts, such a statement does serve to remind the jury, in the usual case where the court makes no more than fair comment for clarification and to aid the jury in its deliberations, that it must exercise its own judgment and not take what the court has said without further deliberation of its own. In the present case the trial judge, in the course of his comments, amply fulfilled his duty in this regard. 8 J. Moore, *Federal Practice*, *supra*, ¶30.09.

Appellants have also appealed from the denial by the district court of their motions for a new trial, based on newly discovered evidence. The "new evidence" offered by appellants consisted of a tape recording of a conversation taken by the defendant Burtman who, some two and one-half months after the trial, questioned Drucker at his place of business about his trial testimony. At the time and unknown to Drucker, Burtman had the recorder secreted on his person. Appellants then claimed that the recorded conversation indicated that Drucker had lied on the witness stand and that a new trial was therefore necessary. Following a hearing, at which Drucker testified, the trial judge found in an unreported opinion that there was no indication whatsoever "that [Drucker] lied at trial or that he did not answer the questions asked him at that time to the best of his ability." We have carefully examined Drucker's testimony, the recorded statements, and the testimony from the subsequent hearing, and we find no error in the findings and conclusions of the district judge in this regard.

The remaining points raised by appellants are devoid of merit and call for no discussion.

The judgments of conviction are affirmed.

# APPENDIX B

**Opinion on Motion for New Trial**

## United States District Court

SOUTHERN DISTRICT OF NEW YORK

69 Cr. 435

UNITED STATES OF AMERICA,

*—against—*

LEONARD BURTMAN and BENEDICT HIMMEL,
*Defendants.*

APPEARANCES:

WHITNEY NORTH SEYMOUR, JR.,
United States Attorney
for the Southern District of New York,

by RICHARD A. GIVENS,
Assistant United States Attorney,
for the United States.

HERBERT MONTE LEVY, Esq.,
New York City, for defendants.

CANNELLA, *J.*

Defendants' motion for a new trial based on the ground of newly discovered evidence, made pursuant to Rule 33 of the Federal Rules of Criminal Procedure, is denied.

On October 29, 1969, a jury found the defendants guilty of conspiring[1] to circumvent the customs laws of the United

[1] In violation of 18 U.S.C. § 371.

States. The present motion was filed on January 26, 1970, and a hearing was held on January 28th. The purported "newly discovered evidence" consists of a tape recording of a personal conversation defendant Burtman apparently had with one Morris Drucker on January 13, 1970. Mr. Drucker had been a prosecution witness[2] at defendants' trial, and they argue that the record conversation shows that part of Drucker's testimony was a lie.

On direct examination at the trial, Drucker testified that he has a printing business and that in October, 1967 he offered defendant Burtman the use of space on his business premises for the storage of some [wooden] crates. He further testified that the crates were delivered "about a week before Christmas . . . 1967."[3] Mr. Drucker was thereafter cross-examined by defendants' attorney as follows:

> Q. Mr. Drucker, you say you received a phone call from Mr. Burtman on the day the shipment arrived, December 27, 1967; is that correct? A. Within a few days of that, yes.
>
> Q. Well, do you know whether it was the same day the shipment arrived, or wasn't it? A. It may have been a day after. I don't know.
>
> Q. He may have called you the day after the shipment arrived? A. Yes.
>
> Q. Did Mr. Burtman's secretary or a phone operator get on the telephone first, or did he come on right away, or how did you happen to receive the call? A. I don't remember, but I remember speaking

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[2] The government called a total of nine witnesses: Alan Murray, James Dunn, Edward Walsh, Eli Dodkow, Drucker, Jeffrey Rosenberg, Michael Kehyaian, Robert Poland and George Garyfallou.

[3] Trial Minutes, p. 396.

to him. Whether he called me directly or indirectly, I don't remember.

Q. Anything impress you as at all unusual about the phone call? A. Yes.

Q. Seemed like a perfectly normal every day call that you always get? A. Not from him.[4]

Claiming that he "was extremely upset and disturbed about Mr. Drucker's testimony",[5] defendant Burtman nevertheless waited some two and a half months or until just two days before the date scheduled for his sentencing[6] to confront Drucker in order to record (with a concealed miniature tape recording device) a conversation replete with Burtman protestations of innocence and accusations that Drucker had lied on the witness stand. At the hearing on the motion herein, Drucker again took the stand as a government witness. He refused to recant his trial testimony, but rather reaffirmed it and denied that he had lied. He readily accepted defendants' transcript of the conversation on January 13th as being accurate and testified that whatever seemingly contradictory remarks he may have made to defendant Burtman were said for purposes of conciliation, to avoid rubbing salt into the defendant's wound, so to speak.

Defendants further claim to have learned recently from a codefendant[7] that "he had learned that [another] prosecution witness, Michael Kehyaian, had served time in [a] federal prison,"[8] that this was unknown to them at the time of trial, and that this constitutes newly discovered evidence. At the hearing on the motion, however, the de-

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[4] Trial Minutes, pp. 397-98.

[5] Burtman Affidavit, p. 2.

[6] January 15, 1970.

[7] A mistrial was declared as to him after the jury failed to reach a verdict.

[8] Burtman Affidavit, p. 6.

fendants presented nothing whatsoever tending to substantiate their contention regarding Kehyaian, although the government, for purposes of the motion, was willing to concede that he may have been imprisoned at one time or another for a federal crime. Mr. Kehyaian testified at the trial that he was "employed or in partnership"[9] with Morris Drucker in December, 1967 at which time he met defendant Himmell, who had come to the printing plant to inspect and open the wooden crates stored there. Mr. Kehyaian identified Government's Exhibit 10 as being a piece of wood from one of the crates and Government's Exhibits 11 and 12 as being labels from a crate. He further testified that he saw that the contents of the crates were not cups and saucers and earthenware, but rather books and booklets.

In support of their motion, the defendants rely on their attorney's very thorough exposition of the various factors involved in determining such a motion for a new trial in *Justice—After Trial*, 11 N.Y.L. Forum 240-313, 369-457 (1965). This article sets forth requirements[10] to be met before a new trial can be granted which are substantially in agreement with those listed, for example, in *Pitts* v. *United States*, 263 F.2d 808, 810, (9th Cir.), *cert. denied*, 360 U.S. 919, rehearing denied, 361 U.S. 857 (1959). The last of these requirements is that the newly discovered evidence be such that, at a new trial, it would probably produce an acquittal. In discussing the kind and quantum of evidence necessary to secure a new trial in federal cases, defendants' attorney makes the following point, albeit in a context of disapproval:

> . . . the convict has to sustain perhaps even more than the burden of proof that his new trial would probably or might very well produce an acquittal.

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[9] Trial Minutes, p. 410.

[10] See 11 N.Y.L. Forum at 245.

> It may well be that a new trial cannot be granted, even when trial evidence is successfully impeached, when there is unimpeached evidence sufficient to support the conviction. 11 N.Y.L. Forum at 295.

Counsel further contends, again with disapproval, that "results in federal cases indicate fairly clearly that new trials will not be granted unless there appears a strong indication of innocence."[11] However, whatever the degree of perceptiveness of this evaluation might be, the court finds in the present motion that the defendants have failed to sustain even a minimal burden of proof; and they certainly have not met the standard described by their attorney. Mr. Drucker reaffirmed at the hearing, *under oath*, his trial testimony. Any statements he made to defendant Burtman on January 13th were not said, of course, under oath, nor does the court find that they indicate in any way that he lied at the trial or that he did not answer the questions asked him at that time to the best of his ability. The allegation regarding Kehyaian was totally unsubstantiated by the defendants at the hearing, which fact infers at least a lack of the requisite diligence on their part.[12] Thus, even if the court had defense counsel's "predisposition . . . to want more liberality in the rules governing new trials on the basis of new evidence,"[13] it still would be bound to deny this motion for lack of any such evi-

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[11] 11 N.Y.L. Forum at 295.

[12] The second requirement listed in *Pitts* v. *United States* is that the motion for a new trial "must allege facts from which the court may infer diligence on the part of the movant." 263 F.2d at 810.

[13] 11 N.Y.L. Forum at 241.

dence. The granting or refusal to grant such motions lies within the sound discretion of the trial court,[14] but defendants' motion herein leaves no room for the exercise of this discretion. The motion is therefore denied.

JOHN M. CANNELLA
U.S.D.J.

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[14] See, e.g., *United States* v. *Hoffa*, 382 F.2d 856, 862 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968).

# APPENDIX C

## Order Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of July one thousand nine hundred and seventy.

Present:

HON. ROBERT P. ANDERSON,
HON. WILFRED FEINBERG,
Circuit Judges.
HON. LLOYD F. MACMAHON,
District Judge.

69 Cr. 435

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*v.*

CHARLES TOURINE, a/k/a CHARLIE WHITE, *et al.*,

Defendants,

LEONARD BURTMAN and BENEDICT HIMMEL,

Defendants-Appellants.

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Appeal from the United States District Court for the Southern District of New York.

## *Appendix C*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

A. Daniel Fusaro,
Clerk.

## APPENDIX D

### Order of Court of Appeals on Petition for Rehearing and Motion for Stay of Mandate

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

*v.*

CHARLES TOURINE, a/k/a CHARLIE WHITE, *et al.*,

Defendants,

LEONARD BURTMAN and BENEDICT HIMMEL,

Defendants-Appellants.

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A petition for a rehearing together with a motion to stay the issuance of the mandate having been filed herein by counsel for the defendants-appellants,

Upon consideration thereof, it is

ORDERED that said petition and said motion be and they hereby are denied.

ROBERT P. ANDERSON,
United States Circuit Judge.

LLOYD F. MACMAHON,
United States District Judge,
sitting by designation.

August 18, 1970

## APPENDIX E

### Memorandum of Mr. Justice Harlan Annexed to his September 25, 1970 Order Staying Execution and Enforcement of the Mandate

But for the admission into evidence against these petitioners of certain of the testimony of Agent Murray, I would be constrained to deny this application. As to that point, however, I am left unpersuaded by the Government's original and supplemental oppositions that a certworthy issue may not be deemed by at least four members of this Court to be presented. Hence, in the absence of any claim on the part of the Government that these petitioners are poor bail risks, I conclude that a stay should issue, pending timely filing of a petition for certiorari. An order to that effect will be entered.